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No. _____

Supreme Court, U.S.
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In the

Supreme Court of the United States

October Term, 1990

CHARLES WHITE, *et al.*,

Petitioners,

v.

RAYMOND S. DANIEL, *et al.*,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the court of appeals erred in holding that a reapportionment plan adopted in 1971 and found by the district court to dilute minority voting strength in violation of § 2 of the Voting Rights Act was immune from challenge under the doctrine of laches because the plaintiffs did not file their complaint at the time the plan was first enacted, despite the facts that (1) the voting rights violation was continuing in nature, and (2) a challenge under amended § 2 was unavailable in 1971.

2. Whether the court of appeals properly invoked the doctrine of laches to bar a challenge to a reapportionment plan found by the district court to violate § 2 of the Voting Rights Act, where the affirmative defense of laches was rejected as untimely by the district court, and in the complete absence of any trial court record or findings of a disruption to the electoral process or any burden upon the jurisdiction at all.

PARTIES

Petitioners-Plaintiffs: Charles White, George S. Smith and James A. Smith, Jr.

Respondents-Defendants: Raymond S. Daniel, Thomas B. Taylor, Walter Rice, Marion W. Peebles and Paul Harrison, in their official capacities as members of the Board of Supervisors of Brunswick County, Virginia; Matthew B. Morton, C.M. Caldwell, and Jesse E. Capps, Sr., in their official capacities as members of the Electoral Board of Brunswick County, Virginia, and Barbara Lewis, in her official capacity as Registrar of Brunswick County, Virginia.

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No. _____

IN THE SUPREME COURT
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October Term, 1990

CHARLES WHITE, *et al.*,

Petitioners,

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RAYMOND S. DANIEL, *et al.*,

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**PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT**

The petitioners, Charles White, *et al.*, respectfully request that a writ of *certiorari* issue to review the judgment and opinion of the United States Court of Appeals for the Fourth Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit dismissing the complaint and vacating the decision of the district court on the ground of laches is reported as *White v. Daniel*, 909 F.2d 99 (4th Cir. 1990), and is reproduced herein at App. 3. The memorandum opinion of the district court, finding that the defendants' reapportionment plan violated § 2 of the Voting Rights Act, is unreported and is reproduced herein at App. 20.

JURISDICTION

The judgment of the court of appeals was entered on July 23, 1990. The order of the court of appeals denying the petition for rehearing and suggestion for rehearing *en banc* was entered on August 14, 1990. On November 8, 1990, this Court entered an order granting an extension of time within which to file the petition for writ of *certiorari* until December 3, 1990.

This Court has jurisdiction to review the judgment under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

The statutory provision relevant to this case is § 2 of the Voting Rights Act of 1965, as amended, 42 U.S.C. § 1973, which provides as follows:

> (a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision is a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in section 1973b (f) (2) of this title, as provided in subsection (b) of this section.
>
> (b) A violation of subsection (a) of this section is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) of this section in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. The extent to which members of a protected class have been elected to office in the

State or political subdivision is one circumstance which may be considered: *Provided*, That nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.

STATEMENT OF THE CASE

Brunswick County is a rural county in southside Virginia with a black population majority of 57%. The county is governed by a five-member Board of Supervisors elected from districts. In 1971 the all-white Board adopted a reapportionment plan consisting of five single-member districts, two of which contained a black voting-age population majority. The total deviation among districts was 5.8%. In 1975 two blacks were elected to the Board from the two black-majority districts, the first and only blacks elected to that body since Reconstruction. App. 22.

Since 1975, blacks have frequently run for the other seats on the Board, but none has ever been elected. Blacks have also run for countywide offices such as sheriff, treasurer, commissioner of revenue, and clerk of circuit court. No black has ever succeeded in a countywide election, except after this litigation was filed, when a black was elected clerk of circuit court with 37% of the vote against several white opponents. App. 23.

The 1980 Census revealed that the county had lost about 3% of its total population, and that the total deviation among supervisory districts was 10%. The Board voted not to redistrict. App. 22.

The petitioners, black residents of Brunswick County and the Brunswick County Chapter of the NAACP, brought this action in 1988 pursuant to § 2 of the Voting Rights Act of 1965, as amended, 42 U.S.C. § 1973, and the Constitution of the United States. They alleged that the existing reapportionment for the Board diluted their voting strength, and requested declaratory and injunctive relief, including special elections.

The district court, following a trial on the merits, made detailed findings of fact. It found, *inter alia*, that:

> (1) "Historically, both Brunswick County and the Commonwealth of Virginia have discriminated against their black citizens [in voting, access to public accommodations and marriages]." App. 24.
>
> (2) The Board opposed desegregation and busing. In 1959, it "passed a resolution opposing the hiring of white professors at St. Paul's College, a black college in the county." "Until 1969, the Board of Supervisors approved private tuition grants for white parents to allow their children to attend private schools." App. 24-25.
>
> (3) In 1982, blacks petitioned the county registrar to expand opportunities for voter registration. "The registrar resisted and eventually resigned rather than implement any changes in voter registration." App. 25.

(4) Schools are racially identifiable. "[M]ore than two-thirds of the white children who live in Sturgeon [where the elementary school is 98% black] and [who] attend public elementary school attend school in another district." App. 25.

(5) Blacks have been "seriously underrepresented on government boards and commissions in Brunswick County." "Not a single board or commission has a black majority." App. 26.

(6) Although vacancies have occurred on the Board of Supervisors, no black has ever been appointed to fill an unexpired term. App. 27.

(7) In 1988, 87% of the county's full-time employees were white. "None of the black employees [was] employed in an administrative or professional position." App. 27.

(8) The Ku Klux Klan "was very active in Brunswick County in the 1960's." There was "great resistance within the county" to school desegregation, and local residents established an all-white private academy. "The segregated movie theater closed rather than integrate." "As recently as 1981, the Brunswick County Homemakers group disbanded rather than integrate as ordered by the Department of Agriculture." App. 27-28.

(9) "Segregation is the norm in all aspects of Brunswick County life. . . . [V]irtually all social clubs, political clubs [including the Democratic and Republican Parties], and churches [are] either all-white or all-black." App. 28.

(10) "[B]lacks suffer from lower educational, economic, and employment levels." App. 28.

The district court, applying the three-part analysis in *Thornburg v. Gingles*, 478 U.S. 30, 50-51 (1986),[1] and after considering the factors identified in the Senate Report accompanying the 1982 amendments to the Voting Rights Act, S. Rep. No. 417, 97th Cong., 2d Sess. (1982),[2] found that

> the black population of Brunswick County is sufficiently large and geographically compact to constitute an effective voting majority in three election districts, . . . that voting in Brunswick County is racially polarized, that the black population of Brunswick County is politically cohesive, and that monolithic white bloc voting is significant enough to usually defeat the minority's preferred candidate.

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[1] In *Gingles*, this Court held that to establish a § 2 violation in multi-member districting schemes, a plaintiff must show that (1) the minority group is "sufficiently large and geogaphically compact to constitute a majority in a single-member district"; (2) the minority is "politically cohesive"; and (3) the "white majority votes sufficiently as a bloc to enable it--in the absence of special circumstances . . . --usually to defeat the minority's preferred candidate." *Id.*, 478 U.S. at 50-51.

[2] In S. Rep. No. 417, *supra*, at 28-30, Congress identified various factors probative of vote dilution which courts should consider in evaluating § 2 claims, such as a history of discrimination, polarized voting, the use of enhancing factors (such as majority vote requirements), the continuing effects of discrimination, few minority elected officials, *etc.* *Id.* at 28-30.

App. 32. The court based its findings of racially polarized voting and political cohesiveness upon expert testimony, and upon a statistical analysis similar to that performed in *Gingles*, concerning voting returns in all black-white elections in the county since 1971.

The district court concluded "that under the totality of the circumstances, the current system for election to the Board of Supervisors has interacted with past and present official discrimination and social conditions to deprive the black population of Brunswick County of an equal opportunity to participate in the political system and to elect representatives of their choice" in violation of § 2. App. 39. The court dismissed the plaintiffs' constitutional claim for lack of evidence of intent to discriminate.

The court further found that to provide the "complete" and "full" remedy mandated by Congress for § 2 violations, S. Rep. No. 417, *supra*, at 31, the districting system in the county must be restructured to contain three districts with effective black voting majorities. The defendants neither submitted a remedial plan, nor requested the opportunity to do so; the court adopted one of two plans submitted by the plaintiffs. The court declined to order interim elections, and ruled that the new plan be used for the 1991 elections, but that if the 1990 Census necessitated any redistricting, the plan should be adjusted to the minimum extent necessary, and subject to court supervision.

The county appealed and the court of appeals, without addressing the merits of petitioners' § 2 claim, reversed on the ground that the action was barred by laches. The county had raised the affirmative defense of laches in a motion filed after the deadline for dispositive motions and less than 30 days before trial, but the district court had summarily denied the motion without a hearing because it was not timely.

The court of appeals ruled that the petitioners' delay in challenging the 1971 plan was "inexcusable and unreasonable," App. 11, and that "the County need not show the degree of prejudice that would be required if the delay had been less aggravated." App. 13. The court of appeals, in the absence of any trial court record or findings, concluded that reapportionment "this year," and "probabl[e]" reapportionment in 1991 after the Census, would "greatly prejudice the County and its citizens," that any use of 1980 Census data "would unduly prejudice the County," and that a court-ordered reapportionment "would be completely gratuitous, because there are no elections scheduled before November 1991." App. 15-16.

REASONS FOR GRANTING THE WRIT

I. The Decision of the Court of Appeals will Vitiate the Voting Rights Act and Disfranchise Minority Voters

The decision of the court of appeals, unless reversed, will substantially undermine the enforcement of voting rights. It will shield countless discriminatory voting plans and practices from federal review, will encourage noncompliance with the Voting Rights Act, and cause the disfranchisement of untold numbers of minority voters.

Insofar as petitioners are aware, prior to the decision of the court of appeals in this case, no court had ever held that the doctrine of laches, although frequently raised by defendant jurisdictions, was a bar to an action to enforce amended § 2 of the Voting Rights Act.[3] That is so because violations of voting rights are deemed continuing in nature, "suffered anew" each time a discriminatory election practice or procedure is used. *Smith v. Clinton*, 687 F. Supp. 1310, 1313 (E.D. Ark. 1988)(rejecting the defense of laches to a claim under § 2). *Accord*, *Garza v. County of Los Angeles*, No. 90-55944 (9th Cir. Nov. 2, 1990), slip op. at 19 ("[b]ecause of the

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[3] Section 2 was amended in 1982, in response to the decision in *City of Mobile v. Bolden*, 446 U.S. 55 (1980), to provide that voting practices are unlawful if they result in discrimination, without regard to proof of a discriminatory purpose in their adoption or maintenance as required to establish a constitutional violation. *Gingles*, 478 U.S. at 43-44.

ongoing nature of the violation, plaintiffs' present [§ 2] claim ought not be barred by laches"); *Jeffers v. Clinton*, 730 F. Supp. 196, 203 (E.D. Ark. 1989)(rejecting the defense of laches in a § 2 case on the basis of "fairness and equal opportunity in voting"), *jurisdictional statement filed*, 59 U.S.L.W. 3005 (U.S. July 10, 1990)(No. 89-2008); *Knox v. Milwaukee County Board of Election Commissioners*, 607 F. Supp. 1112, 1116-18 (E.D. Wis. 1985)(rejecting a laches defense in a § 2 case, noting that "the temporal nature of all electoral processes is such that, if the defendants' position were uniformly upheld, all challenges to the constitutionality of reapportionment plans would necessarily be dismissed as untimely or inexcusably delayed"); *Jackson v. Allain*, No. GC84-42-LS-O (N.D. Miss. Feb. 12, 1985)(challenge to voting plan implemented in 1902 not barred by laches because the § 2 violation is continuing in nature and a new injury accrues each time an election is held under the challenged scheme); *Brown v. Chattanooga Board of Commissioners*, No. Civ-1-87-388 (E.D. Tenn., April 10, 1989)(rejecting the defense of laches in a challenge to an election plan adopted in 1911 on the ground that the § 2 violation was continuing in nature); *McCray v. Mississippi State Board of Election Commissioners*, No. DC84-131-LS (N.D. Miss.

Feb. 12, 1985)(laches defense "insufficient as a matter of law" to defeat a § 2 challenge).[4]

The adoption of a discriminatory districting plan, or a discriminatory literacy test or poll tax, is not a discrete act from which flows, instantaneously, all the injury it may ultimately visit on minority voters. Rather, the violation of voting rights is continuing in nature, and the denial of fundamental rights which it causes is renewed each time an election is conducted using the discriminatory practice.[5]

The courts have also uniformly rejected the defense of laches in connection with other provisions of the Act. *See Dotson v. City of Indianola*, 514 F. Supp. 397, 401 (N.D. Miss. 1981)(delay in bringing suit does not bar a voting rights claim under § 5 of the Act since a violation "arises anew each time the defendant enacts or seeks to administer an uncleared voting regulation"), *aff'd*, 456 U.S. 1002 (1982); *Henderson v. Graddick*, 641 F. Sup. 1192, 1200 (M.D. Ala. 1986)(equitable defense not available in

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[4] *Maryland Citizens for a Representative General Assembly v. Governor of Maryland*, 429 F.2d 606 (4th Cir. 1970), and *Simkins v. Gressette*, 495 F. Supp. 1075 (D.S.C. 1980), *aff'd*, 631 F.2d 287 (4th Cir. 1980), cited in the opinion of the court of appeals, are inapposite. Both were decided prior to the amendment of § 2 and both were decided solely on constitutional grounds. In neither was the issue whether laches was a bar to suit under § 2 raised, discussed or resolved.

[5] The concept of a continuing violation of protected rights has been applied by this Court in other contexts as well. *See, e.g., Corning Glass Works v. Brennan*, 417 U.S. 188, 305-10 (1974)(the practice of paying discriminatorily unequal wages occurs not only when employer sets wage scale but as long as the discriminatory pay differential continues in effect).

§ 5 enforcement proceedings); *Haith v. Martin*, 618 F. Supp. 410, 414 (E.D.N.C. 1985)(the Voting Rights Act "does not give this court the power to provide equitable relief to defendants, no matter how just their cause"), *aff'd*, 477 U.S. 901 (1986).

While the proximity of elections and delay in bringing suit might be taken into account in granting preliminary injunctive relief or in fashioning a remedy, *e.g.*, *McNeil v. Springfield Park District*, 656 F. Supp. 1200 (C.D. Ill. 1987), *aff'd on other grounds*, 851 F.2d 937 (7th Cir. 1988), they form no basis for the complete dismissal of petitioners' complaint. No jurisdiction has a right grounded in equity to violate the Voting Rights Act. To create such a right, as did the court of appeals, would transform a jurisdiction's long-standing failure to comply with § 2 into a defense. Given the logic of the court of appeals, the longer a jurisdiction failed to comply with § 2 the stronger its equitable defense would become. Adopting such an argument would do precisely what the Act was designed to forbid: "allow the burden of litigation delay to operate in favor of the perpetrators and against the victims of possibly racially discriminatory practices." *Berry v. Doles*, 438 U.S. 190, 194 (1978)(Brennan, J., concurring).

The application of the doctrine of laches to dismiss voting rights cases would subvert the enforcement scheme established by Congress and frustrate the remedial purposes of the Act. Congress enacted the Voting Rights

Act of 1965 because of the failure of prior civil rights acts, *i.e.*, the 1957, 1960 and 1964 Civil Rights Acts, to remedy the problem of discrimination in voting in a prompt and decisive manner. *South Carolina v. Katzenbach*, 383 U.S. 301, 313 (1966)("[d]espite the earnest efforts of the Justice Department and of many federal judges, these new laws have done little to cure the problem of voting discrimination"). The weakness of the earlier laws was that they depended primarily upon case-by-case litigation for enforcement, and gave the advantages of delay and inertia to discrimination-prone jurisdictions. *Id.*, 383 U.S. at 328. In addition, once discriminatory laws were struck down by the courts, the affected jurisdictions often merely enacted new laws, equally discriminatory, to take their places. *Id.* at 314, 335. Responding to the "insidious and pervasive evil" of discrimination in voting, Congress enacted the stringent remedial provisions of the Voting Rights Act "to shift the advantage of time and inertia from the perpetrators of the evil to its victims." *Id.* at 309, 328.

In the legislative history of the 1965 Act, as well as its 1970, 1975 and 1982 extensions, Congress repeatedly expressed its intent "that voting restraints on account of race or color should be removed as quickly as possible in order to 'open the door to the exercise of constitutional rights conferred almost a century ago.'" *NAACP v. New York*, 413 U.S. 345, 354 (1973), *quoting* H.R. Rep. No. 439, 89th Cong., 1st Sess. 11 (1965). *See also* S. Rep. No. 162, pt. 3, 89th Cong., 1st Sess. 6-7 (1965); H.R. Rep. No. 227,

97th Cong., 1st Sess. 3 (1981); S. Rep. No. 417, *supra*, at 5 ("[o]verall, Congress hoped by passage of the Voting Rights Act to create a set of mechanisms for dealing with continuing voting discrimination, not step by step, but comprehensively and finally"); *Harris v. Graddick*, 593 F. Supp. 128, 136 (M.D. Ala. 1984).

The congressional concern with avoiding procedural traps and delays in litigation and the resolution of voting rights disputes is evident throughout the Voting Rights Act. Section 4(b) of the Act, 42 U.S.C. § 1973b(b), for example, prohibits all judicial review of § 5 coverage determinations by the Attorney General or the Director of the Census. This Court held the provision constitutional, concluding that the preclusion of judicial review "implements Congress' intention to eradicate the blight of voting discrimination *with all possible speed*." *Briscoe v. Bell*, 432 U.S. 404, 410 (1977)(emphasis added). This Court has held for the same reason that the decision of a three-judge court denying intervention in a bailout suit brought under § 4 of the Act, 42 U.S.C. § 1973b, is directly appealable to the Supreme Court and not the court of appeals. This Court reached its conclusion based on the language of § 4 and "in the light of Congress' concern about hastening the resolution of suits involving voting rights." *NAACP v. New York*, 413 U.S. at 355.

During the Senate debates on extension of the Voting Rights Act in 1982, Senator Moynihan expressed the sentiment of Congress that delay and deference to

local jurisdictions in voting rights disputes was no longer tolerable.

> The issue of voting rights is an issue that was with us over four or five generations and now into the sixth one[;] [we are] scarcely precipitous in our conduct and not altogether admirable in our willingness to be patient. There are some things concerning which patience is scarcely a virtue and after a point . . . becomes a form of avoidance.

128 Cong. Rec. S6717 (daily ed. June 14, 1982)(remarks of Sen. Moynihan).

The impatience of Congress over the continued delay in implementation of equal voting rights is reflected in the overwhelming margins by which the 1982 amendments were passed in the Senate and the House. The original House bill was passed by a vote of 389 to 24. 127 Cong. Rec. H7011 (daily ed. Oct. 5, 1981). The Senate version containing the present language of § 2 was passed 85 to 8, 128 Cong. Rec. S7139 (daily ed. June 18, 1982), and received unanimous concurrence in the House. 128 Cong. Rec. H3840 (daily ed. June 23, 1982). Given the clear and unambiguous intent of Congress that voting rights disputes be promptly resolved, and that the advantage of time and inertia be shifted from the perpetrators of possible discrimination in voting to its victims, there is no basis for applying, as did the court of appeals in this case, the doctrine of laches. Public and

congressional policy command that voting rights issues be resolved "with all possible speed." *Briscoe v. Bell*, 432 U.S. at 410. There is no policy to reward those who have discriminated longest.

The use of laches to dismiss the complaint in this case, with the consequent reinstatement of a voting plan found by the district court to be violative of § 2, would also deprive the plaintiffs of a non-discriminatory benchmark for measuring retrogression of any new plan submitted for § 5 preclearance following the 1990 Census and reapportionment. This Court has held that the standard for determining discriminatory effect under § 5 is one of retrogression based on a comparison of the proposed change with the pre-existing practice. *Beer v. United States*, 425 U.S. 130 (1976). While a pre-existing apportionment plan will often be statutory, an intervening court-ordered plan replaces it and becomes the benchmark for determining retrogression. *See Mississippi v. United States*, 490 F. Supp. 569, 582 (D.D.C. 1979)(court-approved plan "must now be considered the pre-existing plan and the benchmark with which to compare the statutory plan"), *aff'd mem.*, 444 U.S. 1050 (1980); *Mississippi v. Smith*, 541 F. Supp. 1329, 1332-33 (D.D.C. 1982), *appeal dism'd*, 461 U.S. 912 (1983). Thus, the remedial plan adopted by the district court in this case, far from being "gratuitous," as the court of appeals termed it, App. 16, would have become the non-discriminatory benchmark by which any new plan

necessitated by the 1990 Census would be measured to determine its compliance with the effect standard of § 5. By dismissing the complaint and vacating the order of the district court, the court of appeals has ensured that any new apportionment will now be measured by a plan that the district court found was racially discriminatory. Such circumvention of minority voting rights cannot be squared with the Voting Rights Act upon any theory.

What *was* gratuitous was the finding by the court of appeals, in the total absence of a record or any findings by the district court, that the county was prejudiced by the delay in filing suit. In fact, the county was not. To reach its result, the court resorted to an "inference of prejudice," App. 11, and adopted essentially a *per se* rule for applying laches. The court speculated that the Board of Supervisors would "be required to reapportion itself this year and it will probably be required to do so again next year, when the results of the 1990 census are available." App. 15. It further speculated that the 1980 census "might not" be accurate. App. 16.

As a practical matter, the census is only accurate the day it is completed (if then), but that is no basis for rejecting its results in the absence of other demonstrably more accurate data. Otherwise, there would never be any reapportionment. *Kirkpatrick v. Preisler*, 394 U.S. 526, 535, 538-39 (1969). Having to redraw district lines to redress a § 2 violation cannot legally or logically be regarded as prejudice flowing from the petitioners' alleged delay.

Rather, it is the consequence of the unlawfulness of the existing plan. *Jeffers v. Clinton*, 730 F. Supp. 196, 203 (E.D. Ark. 1989) (any "expense and disruption" that will occur as the result of the district court's order "are nothing but a consequence of the wrong that has been done"). Moreover, the plan approved by the district court was prepared by the plaintiffs, not the county, and nothing was required to be done under the plan until the 1991 elections, after the more current census data became available. Under these circumstances, the county was not in fact prejudiced by any alleged delay in the filing of the lawsuit.

On the other hand, the hardship to the petitioners from the court of appeals' decision is both severe and long-term. In 1981, the Board of Supervisors chose not to redistrict in the face of a small decline in population. The defendants' evidence at trial established that the population decline of 1971-1981 has been slightly offset during the past ten years, making it unlikely that reapportionment will be constitutionally required in 1991. Under the logic of the court of appeals' decision, if the Board chooses not to redistrict in 1991, laches will continue to bar any challenge to the existing plan during the coming decade as well. The Board may thus continue to violate the Voting Rights Act with impunity for at least the next ten years. Indeed, given the stability of the county's population, it may well be that these petitioners

will have no opportunity to enforce their rights under the Act during their own lifetimes.

The court of appeals' decision sweeps broadly enough to impute laches to would-be minority plaintiffs who were not residents of the jurisdiction, or were not even born, at the time the plan was adopted in 1971. To charge them with inexcusable delay in asserting their rights would be both unfair and irrational.

The court of appeals' analysis would also preclude a § 2 challenge to a plan which had become discriminatory in its effect by the time of filing suit, but which had been racially neutral in its purpose and effect when first adopted. Such a paradigm would undermine the "'functional' view of the political process" adopted by Congress when it amended § 2 in 1982. *Gingles*, 478 U.S. at 45.[6]

As illustrated by the cases cited above in which the laches defense was raised, adoption of the rationale of the

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[6] The unfairness of the laches argument is further underscored by the fact that a cause of action under amended § 2 did not arise until 1982, six years before the filing of the complaint, not 17 as indicated by the court of appeals. Even assuming laches were to apply, the petitioners could hardly be faulted for neglecting to file suit prior to the existence of a cause of action under the amended statute. Furthermore, this Court did not construe amended § 2 until June, 1986, in *Thornburg v. Gingles*. The petitioners filed their complaint two years later. Again, any "inexcusable delay" is hardly of the magnitude suggested by the court of appeals. *See Smith v. Clinton*, 687 F. Supp. at 1313 (rejecting laches defense in part because of intervening "significant developments" in voting rights law, specifically the 1982 amendments and the *Gingles* decision).

court of appeals would shield countless discriminatory election plans and practices from federal review, and would disfranchise untold numbers of minority voters. *Certiorari* should be granted because of the overriding importance of the issue presented involving the application of § 2 of the Voting Rights Act.

II. There Exists a Conflict between the Circuits on the Application of Laches to Cases under § 2 of the Voting Rights Act

There is a direct conflict between the decision in this case and the decision in *Garza v. County of Los Angeles*, No. 90-55944 (9th Cir. Nov. 2, 1990), on the question whether the doctrine of laches is a bar to an action challenging a continuing violation of voting rights under § 2 of the Voting Rights Act. In *Garza*, the defendants contended that the plaintiffs' seven-year delay in challenging the county's 1981 redistricting plan constituted inexcusable delay, and that the complaint should be dismissed on laches grounds. The defendants, moreover, made exactly the same arguments as those articulated by the court of appeals as the basis for its decision in this case, *i.e.*, "that substantial hardship will result from a districting now, when another regularly scheduled one is to occur so closely on its heels," and that "the plaintiffs had no excuse for their delay in bringing

suit." *Garza*, slip op. at 19. The Ninth Circuit Court of Appeals rejected the proffered laches defense.[7]

According to the Ninth Circuit, the plaintiffs' failure to file suit in 1981 "does not constitute laches." *Id.* The court reasoned that the injury suffered had been "getting progressively worse" in the years since the plan was adopted, since the political underrepresentation complained of had grown more severe as minority population increased. The court concluded that, "[b]ecause of the ongoing nature of the violation, plaintiffs' present claim ought not be barred by laches." *Id.*

Plenary review is warranted in this case because the Fourth Circuit Court of Appeals has rendered a decision in conflict with the decision of the Ninth Circuit Court of Appeals on the same matter.

CONCLUSION

For the foregoing reasons, the present petition for *certiorari* should be granted.

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[7] It should be noted that the Ninth Circuit found no substantial hardship would inure to government defendants who were required to redistrict a county with a population of more than seven million people and significant recent demographic changes. Yet the Fourth Circuit found the opposite in a county with only 15,632 people and no significant demographic changes.

Respectfully submitted,

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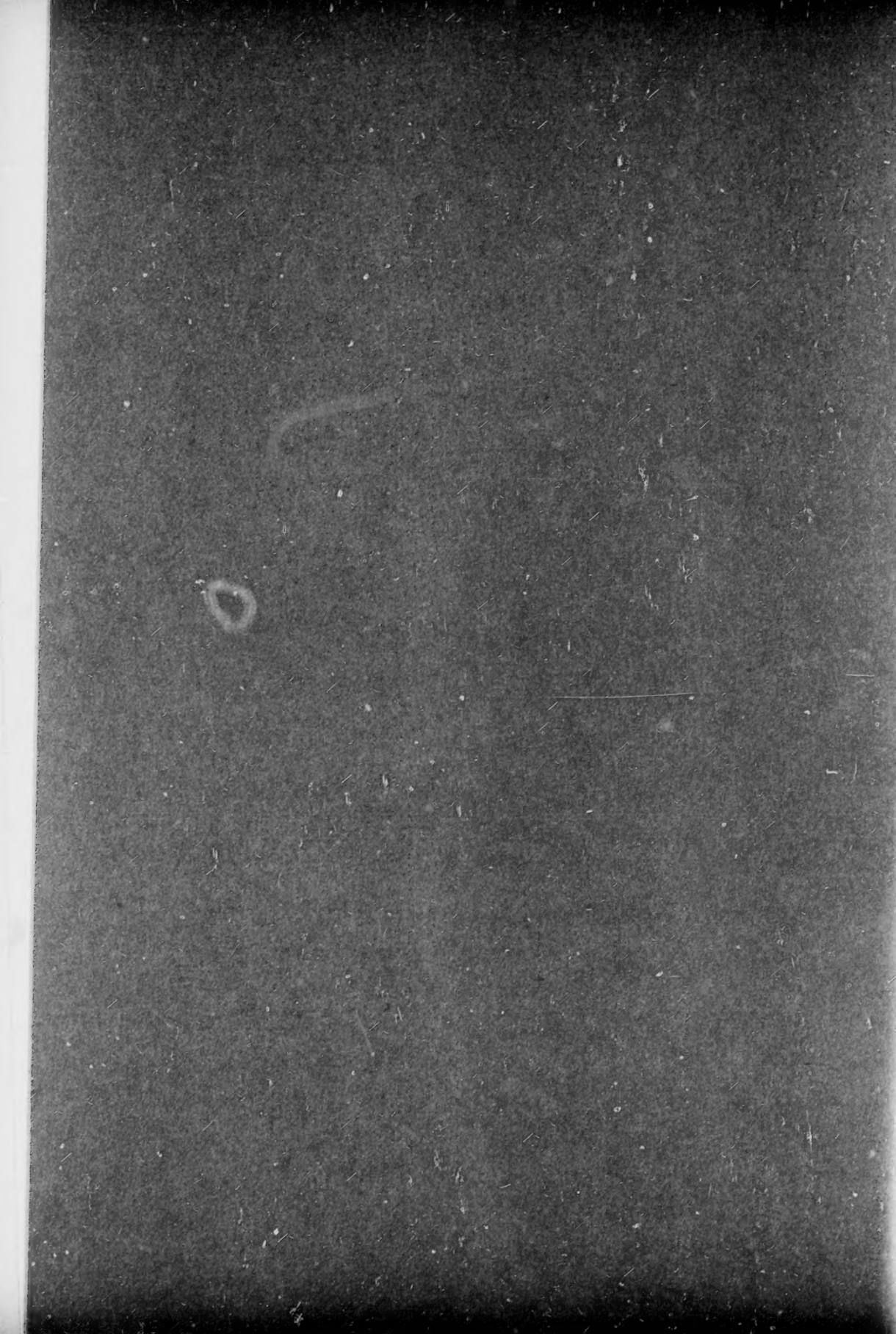

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

FILED
August 14, 1990

No. 89-1550

CHARLES WHITE; GEORGE R. SMITH and JAMES A. SMITH, JR.,

Plaintiffs - Appellees,

v.

RAYMOND S. DANIEL; THOMAS B. TAYLOR; WALTER RICE; MARION W. PEEBLES and PAUL HARRISON, in their official capacities as members of the Board of Supervisors of Brunswick County, Virginia; MATHEW B. MORTON; C. M. CALDWELL and JESSE E. CAPPS, SR., in their official capacities as members of the Electoral Board of Brunswick County, Virginia and BARBARA LEWIS, in her official capacity as Registrar of Brunswick County, Virginia,

Defendants - Appellants.

On Petition for Rehearing with Suggestion for Rehearing In Banc

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The appellees' petition for rehearing and suggestion for rehearing in banc were submitted to this Court. As no member of this Court or the panel requested a poll on the suggestion for rehearing in banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied,

IT IS ORDERED that the petition for rehearing and suggestion for rehearing in banc are denied.

Entered at the direction of Judge Chapman with the concurrence of Judge Sprouse and Judge Wilkins.

For the Court,

JOHN M. GREACEN
CLERK

PUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 89-1550

CHARLES WHITE; GEORGE R. SMITH and JAMES A. SMITH, JR.,

Plaintiffs - Appellees,

versus

RAYMOND S. DANIEL; THOMAS B. TAYLOR; WALTER RICE; MARION W. PEEBLES and PAUL HARRISON, in their official capacities as members of the Board of Supervisors of Brunswick County, Virginia; MATHEW B. MORTON; C. M. CALDWELL and JESSE E. CAPPS, SR., in their official capacities as members of the Electoral Board of Brunswick County, Virginia and BARBARA LEWIS, in her official capacity as Registrar of Brunswick County, Virginia,

Defendants - Appellants.

Appeal from the United States District Court for the Eastern District of Virginia, at Richmond. James R. Spencer, District Judge. (CA-88-568-R)

Argued: May 8, 1990 Decided: July 23, 1990

Amended by order filed August 16, 1990

Before SPROUSE, CHAPMAN, and WILKINS, Circuit Judges.

Reversed by published opinion. Judge Chapman wrote the opinion, in which Judge Sprouse and Judge Wilkins joined.

ARGUED: Anne Gordon Greever, HUNTON & WILLIAMS, Richmond, Virginia, for Appellants. Gerald Thomas Zerkin, GERALD T. ZERKIN & ASSOCIATES, Richmond, Virginia, for Appellees. **ON BRIEF:** Joseph D. McCluskey, HUNTON & WILLIAMS, Richmond, Virginia, for Appellants. Karen L. Ely-Pierce, Kelley H. Brandt, GERALD T. ZERKIN & ASSOCIATES, Richmond, Virginia, for Appellees.

CHAPMAN, Circuit Judge:

Plaintiffs-appellees Charles White, James A. Smith, Jr., and George R. Smith, who are adult black citizens registered to vote in Brunswick County, Virginia, and the Brunswick County Chapter of the National Association for the Advancement of Colored People (NAACP) brought this action against defendants-appellants, members of the Brunswick County Board of Supervisors (the Board) (Raymond S. Daniel, Thomas B. Taylor, Walter Rice, Marion W. Peebles, and Paul Harrison), members of the Electoral Board of Brunswick County (Mathew B. Morton, C. M. Caldwell, and Jesse E. Capps, Jr.), and the Registrar of Brunswick County (Barbara Lewis). The

plaintiffs allege that the method of election of the members of the Board results in the abridgement of their right to vote in violation of Section 2 of the Voting Rights Act of 1965, 42 U.S.C. § 1973 (Supp. 1989) (the Act), and dilutes, minimizes or cancels the voting strength of blacks in violation of the First, Thirteenth, Fourteenth and Fifteenth Amendments to the United States Constitution. After dismissing plaintiffs' constitutional claims, the district court held that the current electoral system for the Board violated Section 2 of the Act and ordered the redistricting of Brunswick County not later than December 31, 1990. While we recognize and respect the seriousness of plaintiffs' allegations, we find the district court erred in failing to apply the equitable doctrine of laches to bar plaintiffs' present claims, and we reverse.

I

Brunswick County is a primarily rural county in southside Virginia that, according to the 1980 census, is 57.4% black. It is governed by a five-member Board of Supervisors elected every four years from five single member districts. The original districts, which were coextensive with the five magisterial districts (Meherrin, Powellton, Red Oak, Sturgeon, and the town of Lawrenceville), were redistricted in 1971 to comply with the constitutional requirement of proportional representation. This created the present five numbered

districts of which Districts Two and Four had black populations greater than 65%, and Districts Three and Five had black populations greater than 50%. Before the redistricting, only one magisterial district had a black majority over 65%. The County was not redistricted following the 1980 census, which reflected the black population of each district as follows: District One: 50.7%; District Two: 64.8%; District Three: 55%; District Four: 68.2%; and District Five: 48.9%. No one challenged the 1971 redistricting nor the 1981 decision not to redistrict following the 1980 census.

The plaintiffs initiated this action by filing their complaint in September 1988, seventeen years after the 1971 redistricting, and claim that the method of election of the Board violated Section 2. The plaintiffs contended that there was a long history of discrimination against blacks in Brunswick County and that only Districts Two and Four have elected black representatives to the Board since 1975, and the remaining districts have elected no blacks. As a result, the Board has never had a black majority, although the County has a black majority. In its answer, the County asserted in part that plaintiffs' claims for relief are barred by the doctrine of laches.

At the close of plaintiffs' case, the court dismissed their constitutional claim, finding that there was no evidence of intentional discrimination in the formation or implementation of the system. However, the court subsequently held that the County violated plaintiffs'

statutory rights under Section 2 of the Voting Rights Act.[1] Applying the framework set forth in *Thornburg v. Gingles*, 478 U.S. 30 (1986),[2] the district court found that the County's black population is sufficiently large and geographically compact to constitute an effective voting majority in three election districts and that the County's elections were characterized by racially polarized voting. The court relied heavily on the testimony of plaintiffs'

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[1] Section 2(a) of the Voting Rights Act of 1965 prohibits any "voting qualification or prerequisite to voting or standard, practice, or procedure . . . which results in a denial or abridgement of the right of any citizen . . . to vote on account of race or color . . . ." Section 2(b) further states that the Act is violated where the "totality of circumstances" reveals that "the political processes leading to nomination or election . . . are not equally open to participation by members of a [protected class] . . . in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice." *See generally Thornburg v. Gingles*, 478 U.S. 30, 36 (1986); *Collins v. City of Norfolk*, 816 F.2d 932, 935 (4th Cir. 1987).

[2] In *Gingles*, the Supreme Court set forth a three-part test, under which the plaintiffs must prove

> (1) that the minority group is "sufficiently large and geographically compact to constitute a majority in a single-member district;"
> (2) that the minority group is "politically cohesive;" and
> (3) that "the white majority votes sufficiently as a bloc to enable it - in the absence of special circumstances . . . - usually to defeat the minority's preferred candidate."

Gingles, 478 U.S. at 50-51. The latter two elements are typically synthesized into a general inquiry whether there is racial bloc or racially polarized voting.

expert witness, Dr. Allan J. Lichtman.[3] Consequently, the court concluded that "the current system for election to the Board of Supervisors has interacted with past and present official discrimination and social conditions to deprive the black population of an equal opportunity to participate in the political system and to elect representatives of their choice."

II

We need not address the variety of claims made by the plaintiffs, because we feel that the application of the doctrine of laches is dispositive. Laches is one of the affirmative defenses generally allowable under Fed. R. Civ. P. 8(c), although it is properly relevant only where the claims presented may be characterized as equitable, rather than legal. *See Environmental Defense Fund, Inc.*

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[3] Dr. Lichtman offered several kinds of evidence. First were correlations of individual behavior to aggregate level data. In this analysis, he reviewed evidence of voting returns in every County election since 1971 where a black candidate ran against a white candidate and found that in almost all elections the black received an extremely low percentage of votes in white majority precincts and an extremely high percentage in black majority precincts. He also found that different black candidates in different elections received substantially the same vote in each precinct, which he said was "very unusual."

Second, he prepared a more sophisticated ecological regression analysis to estimate the percentage of blacks and whites who voted for the black and white candidates in any particular election. He found that 98% of the white voters voted for a white candidate, while 2% of the white voters voted for a black candidate; and about 83% of the black voters voted for a black candidate, while 17% voted for a white candidate.

v. Alexander, 614 F.2d 474, 478 (5th Cir.), *cert. denied*, 449 U.S. 919 (1980). Laches imposes on the defendant the ultimate burden of proving "(1) lack of diligence by the party against whom the defense is asserted, and (2) prejudice to the party asserting the defense." *Costello v. United States*, 365 U.S. 265, 282 (1961). Needless to say, whether laches bars an action depends upon the particular circumstances of the case. *National Wildlife Federation v. Burford*, 835 F.2d 305, 318 (D.C. Cir. 1987). As a result, the equitable balancing of a plaintiff's delay with prejudice to a defendant is primarily left to the sound discretion of the trial court, and we may not reverse "'unless it is so clearly wrong as to amount to an abuse of discretion.'" *Lingenfelter v. Keystone Consol. Indus., Inc.*, 691 F.2d 339, 341 (7th Cir. 1982) (quoting *Baker Mfg. Co. v. Whitewater Mfg. Co.*, 430 F.2d 1008, 1009 (7th Cir. 1970), *cert. denied*, 401 U.S. 956 (1971)).

The first element of laches - lack of diligence - exists where "the plaintiff delayed inexcusably or unreasonably in filing suit." *National Wildlife Federation*, 835 F.2d at 318. *See also Giddens v. Isbrandtsen Co.*, 355 F.2d 125, 128 (4th Cir. 1966) (where "inexcusable or inadequately excused delay"); *Baylor University Medical Center v. Heckler*, 758 F.2d 1052, 1057 (5th Cir. 1985) (where "delay is not excusable"). An inexcusable or unreasonable delay may occur only after the plaintiff discovers or with reasonable diligence could have discovered the facts giving rise to his cause of action. *See Ward v. Ackroyd*, 344 F.

Supp. 1202, 1212 (D. Md. 1972); *Knox v. Milwaukee County Bd. of Elections Comm'rs*, 581 F. Supp. 399, 402 (E.D. Wis. 1984). The defendant may show lack of diligence either by proof that the action was not commenced within the period provided by the applicable statute of limitations or by facts otherwise indicating a lack of vigilance. *Giddens*, 355 F.2d at 128.

The second element - prejudice to the defendant - is demonstrated by a disadvantage on the part of the defendant in asserting or establishing a claimed right or some other harm caused by detrimental reliance on the plaintiff's conduct. *Gull Airborne Instruments, Inc. v. Weinberger*, 694 F.2d 838, 844 (D.C. Cir. 1982). However, the defendant "is aided by the inference of prejudice warranted by the plaintiff's delay. The plaintiff is then to be heard to excuse his apparent laggardness and to prove facts manifesting an absence of actual prejudice." *Giddens*, 355 F.2d at 128. Clearly the greater the delay, the less the prejudice required to show laches, and vice versa. But the defendant is ultimately required to prove prejudice (given the defendant's burden to plead and prove laches under Fed. R. Civ. P. 8(c)) and "may either rest on the inference alone or introduce additional evidence." *Id.*

We find that the plaintiffs' delay was inexcusable and unreasonable. The Board adopted the current districting plan in 1971, based on the 1970 census figures; after looking at the 1980 census results, the Board decided in

1981 to continue the 1971 plan with no changes whatsoever. However, the plaintiffs voiced no objection either to the 1971 redistricting or to the 1981 decision not to redistrict, and waited until September 1988 to file this action, seventeen years after the 1971 plan was adopted and months after the last election under the 1981 plan took place.[4]

Plaintiffs contend that their delay was justified on the grounds that the additional time provided them with more elections for the utilization of ecological regression and other methods of determining the existence of racially polarized voting. In particular, plaintiffs point out that filing before November 1987 would have eliminated seven elections on which Dr. Lichtman relied. The plaintiffs ignore the election results from the 1970s and early 1980s that Dr. Lichtman used and do not explain how such results are inadequate to support their claims.[5] Indeed, the conclusions that Dr. Lichtman draws from his analysis do not hinge on elections held after 1987. Therefore, we find that the plaintiffs, in the exercise of reasonable diligence, could have discovered at a much earlier time the facts upon which they now base their claim. The analyses to support their allegations should have been

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[4] No new elections will be held for Brunswick County county supervisors until November 1991.

[5] We note that Dr. Lichtman's analysis used results from elections held in 1971 (two contests), 1972 (one), 1974 (one), 1975 (one), 1981 (one), 1982 (one), 1985 (one), 1987 (three), and 1988 (three).

conducted earlier and well before the last election to be held under the 1981 plan.

Given that plaintiffs' delay is inexcusable and unreasonable, the County need not show the degree of prejudice that would be required if the delay had been less aggravated. In determining the issue of what prejudice is legally cognizable, we note that no case is directly on point. It is clear, however, that a challenge to a reapportionment plan close to the time of a new census, which may require reapportionment, is not favored. In *Maryland Citizens for a Representative General Assembly v. Governor of Maryland*, 429 F.2d 606 (4th Cir. 1970), we found injunctive relief unavailable to plaintiffs who filed thirteen weeks prior to the filing deadline for primary elections to determine the nominees of the parties for the Maryland General Assembly. This court explained that allowing such an action "would necessarily impose great disruption upon potential candidates, the electorate and the elective process." Significantly, we emphasized that any judicially ordered reapportionment would be "good for the 1970 elections only," because the 1970 census would require reapportionment. *Maryland Citizens*, 429 F.2d at 610.

In *Simkins v. Gressette*, 631 F.2d 287 (4th Cir. 1980), this court found injunctive relief foreclosed to plaintiffs who waited to bring suit until two days before the opening of the filing period for candidates seeking nomination for South Carolina state senator, and sixteen days before the

final deadline for filing. Finding the case controlled by *Maryland Citizens*, we explained not only that the delayed suit "would clearly cause a major disruption in the election," but also that the year of the election was "the year of a national census which will likely require reapportionment in South Carolina." *Simkins*, 631 F.2d at 296. Although in *Maryland Citizens* and *Simkins* we emphasized that the untimely challenges were made just before a scheduled election, in each case we found significant the nearness to the next census and resulting reapportionment.[6]

In this case, plaintiffs did not file suit until September 1988, which was after the last election under the 1981 plan, and sixteen months before beginning the 1990

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[6] Both *Maryland Citizens* and *Simkins* arose in the context of plaintiffs' demand for the convening of a three-judge court. This court stated the test for granting such a request as follows:

> If it appears to the single district judge . . . that the complaint does not state a substantial claim for injunctive relief, he need not request the convening of a three-judge court. Insubstantiality in the claim may appear because of the absence of federal jurisdiction, lack of substantial merit in the constitutional claim, *or because injunctive relief is otherwise unavailable.*

Maryland Citizens, 429 F.2d at 611 (footnotes omitted) (emphasis added). Since this court in both cases denied the request on the basis that injunctive relief was not available, and because the availability of injunctive relief depends on such equitable principles as laches, these cases are relevant to the applicability of the doctrine of laches here.

census, which may require reapportionment.[7] Why is this prejudicial to the County? First, "there is large potential for disruption in reapportioning with undue frequency." *Maryland Citizens*, 429 F.2d at 610 (citing *Reynolds v. Sims*, 377 U.S. 533, 583 (1964) ("Limitations on the frequency of reapportionment are justified by the need for stability and continuity in the organization of the legislative system.")). If we affirm the district court's order, the Board will be required to reapportion itself this year and it will probably be required to do so again next year, when the results of the 1990 census are available. We believe that two reapportionments within a short period of two years would greatly prejudice the County and its citizens by creating instability and dislocation in the electoral system and by imposing great financial and logistical burdens. Such a disruption is not justified when there will be no election prior to November 1991, at which time the court-ordered plan may no longer be appropriate because of new census information.

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[7] Prior to the next regularly scheduled Board of Supervisor elections in November 1991, the Board is required, pursuant to Article VII, Section 5 of the Virginia Constitution and to Virginia Code Ann. § 15.1-37.5:1 (1989), to reapportion the election districts using the population figures from the 1990 census.

The 1990 census figures will probably require reapportionment. The 1980 figures initially produced a total population deviation of 14% from the 1970 figures, a deviation that required reapportionment. But after a correction of census error, the total deviation dropped to 10%, which was considered an acceptable level. Since the 1990 figures will probably produce an even greater deviation, reapportionment appears likely.

Second, any reapportionment done now would use 1980 census figures, and such reapportionment might not provide fair and accurate representation for the citizens of the County. Therefore, we find that the district court plan would unduly prejudice the County. *See, e.g.*, *MacGovern v. Connolly*, 637 F. Supp. 111, 116 (D. Mass. 1986) (where court declined to order reapportionment in part because the use of old census figures would "yield results that are at best uncertain and, at worse, perverse"); *Simkins v. Gressette*, 495 F. Supp. 1075, 1082 (D.S.C. 1980) (where court noted that the use of ten year old census figures would not "provide fair representation for the people of South Carolina in accordance with the 'one man, one vote' mandate of [*Reynolds v. Sims*, 377 U.S. 533 (1964)]"), *aff'd*, 631 F.2d 287 (4th Cir. 1980).[8]

Finally, the principles of equity require a federal court to stay its hand when judicial relief makes no sense. A court-ordered reapportionment at this date would be completely gratuitous, because there are no elections scheduled before November 1991 and the 1990 census

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[8] Plaintiffs contend that it is unlikely that the County's population has changed significantly enough to preclude the use of the 1980 census figures. However, we hesitate to risk injustice by relying on plaintiffs' speculative assertion, particularly while the census is in the process of being taken.

figures may require reapportionment.[9] It makes far more sense to await the 1990 census figures and the 1991 reapportionment (if required) than for a court to intervene at such a late hour. If the 1991 reapportionment should violate the Voting Rights Act, the plaintiffs may assert "a new justiciable cause of action." *Maryland Citizens*, 429 F.2d at 611-12.[10]

III

For the above reasons, we hold that plaintiffs' claims are untimely under the doctrine of laches, and the district court abused its discretion in failing to dismiss the case.

REVERSED

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[9] Plaintiffs' complaint requested that the district court order a special Board election to be held under the plan adopted by the court. However, the court declined to order the special election, which plaintiffs do not appeal.

[10] Plaintiffs contend that they will not have enough time to challenge the 1991 reapportionment before the 1991 elections. However, plaintiffs are not in a position to make such a complaint when it is their tardiness in challenging the 1981 reapportionment that led to their predicament.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

CHARLES WHITE, *et al.*,

Plaintiffs,

v. Civil Action No. 88-0568

RAYMOND S. DANIEL, *et al.*,

Defendants.

ORDER

In accordance with the accompanying Memorandum Opinion, the Court FINDS that the current system for election to the Board of Supervisors of Brunswick County violates § 2 of the Voting Rights Act, 42 U.S.C. § 1973 (Supp. 1989). Accordingly, the court ENTERS judgment in favor of plaintiffs and ORDERS defendants to adopt a redistricting plan conforming to the boundaries delineated in plaintiffs' "Voting Plan A."

The Court ORDERS further that this plan shall be in effect for the 1991 election to the Board of Supervisors. If the 1990 census necessitates redistricting of Brunswick County before that election, the Court DIRECTS that such redistricting be done to the minimum extent possible and in accordance with the accompanying Memorandum Opinion. Any redistricting done after the 1990 census shall be subject to Court supervision.

And it is SO ORDERED.

/s/ James R. Spencer
United States District Judge

Date: 31 August 1989

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

CHARLES WHITE, *et al.*,

Plaintiffs,

v. Civil Action No. 88-0568-R

RAYMOND S. DANIEL, *et al.*,

Defendants.

MEMORANDUM OPINION

Plaintiffs Charles White, James A. Smith, Jr., and George R. Smith, are adult black citizens of Brunswick County, Virginia. All are registered voters. Plaintiff Brunswick Chapter of the National Association for the Advancement of Colored People (the "NAACP"), is a non-profit organization based in Brunswick county.

Defendants are the members or the Brunswick County Board of Supervisors (the "Board") (Raymond S. Daniel, Thomas B. Taylor, Walter Rice, Marion W. Peebles, and Paul Harrison), the members of the Electoral

Board of Brunswick County (Mathew B. Morton, C. M. Caldwell, and Jesse E. Capps, Jr.), and the Registrar of Brunswick County, Barbara Lewis. Defendants are sued in their official capacity.

Plaintiffs allege that the current method of election of the members of the Board of Supervisors results in the abridgement of their right to vote in violation of Section 2 of the Voting Rights Act of 1965, 42 U.S.C. § 1973 (Supp. 1989). Plaintiffs also claim that the same method of election dilutes, minimizes, and cancels the voting strength of blacks in violation of plaintiff's rights secured by the 1st, 13th, 14th, and 15th amendments to the United States Constitution. The Court dismissed plaintiff's constitutional claims at the close of plaintiffs' evidence for lack of any showing of intent to discriminate. Consequently, only the statutory claim remains.

I

Brunswick County is a predominantly rural county located in southside Virginia. Greensville County borders Brunswick on the east, Mecklenburg and Lunenburg counties border it on the west, and the state of North Carolina borders it on the south. The county is governed by a five-member Board of Supervisors elected from single member districts. Prior to 1971, the supervisors were elected from the five historical magisterial districts, whose

boundary lines had essentially remained unchanged since Reconstruction. Those five magisterial districts were Meherrin, Powellton, Red Oak, Sturgeon, and the town of Lawrenceville.

The Board redistricted the five magisterial districts in 1971 in order to comply with the constitutional requirements for proportional representation. The resulting election districts had a total population deviation of 5.8%. Two election districts, district two and district four, had black populations greater than 65%. Two other districts, district three and district five, had black populations greater than 50%.

In 1975 district two and district four elected black representatives to the Board. Defendant Harrison, Chairman of the Board, was elected from district two. Defendant Rice was elected from district four. No other black supervisors have been elected since Reconstruction.

The 1980 census showed that Brunswick County's population had dropped from 16,172 to 15,632 and that the black population represented 57.4% of the total population. Initially, the census figures showed that the election districts had a total population deviation of 14%, necessitating redistricting. However, after correction of census error, the total deviation dropped to 10%, considered an acceptable level. Upon correction of the census error, the Board voted to retain the existing election districts. Thus, the Brunswick election districts have remained the same since 1971.

According to the 1980 census, the black population of each district was as follows:

District 1: 50.7%
District 2: 64.4%
District 3: 55.0%
District 4: 68.2%
District 5: 48.9%

Only 67.2% of the black population is of voting age, while 76.35% of the white population is of voting age. As of 1988, 52.3% of the registered voters are black.

A number of blacks other than Harrison and Rice have run for office in Brunswick County. In 1975, Eugene Bartly ran for the district three supervisor's seat and lost by 95 votes. In 1979, James Jones lost to defendant Taylor in district one, George Brooks lost to defendant Daniel in district three, and Harold Maclin lost to Emory Lucy in district five. In 1987, plaintiff George Smith lost to defendant Peebles in district five. Blacks have also run for countywide offices such as Sheriff, Treasurer, Commissioner of Revenue, and Clerk of the Circuit Court. The only successful black candidate in a countywide election has been Constance Rice, who was elected Clerk of the Circuit Court in November, 1988, after this litigation was filed.

II

Historically, both Brunswick County and the Commonwealth of Virginia have discriminated against their black citizens. For example, Virginia used a number of devices to restrict blacks' ability to vote, such as a literacy test, *Commonwealth of Virginia v. United States*, 386 F. Supp. 1319 (D.D.C. 1974) (three judge panel), *aff'd*, 420 U.S. 901 (1975); a poll tax, *Harmon v. Forssenius*, 380 U.S. 528 (1965); and separation of names by race on voter lists, *Griffin v. Board of Supervisors of Prince Edward County*, 339 F.2d 486 (4th Cir. 1964), *aff'd sub nom.*, *Trancil v. Woolls*, 379 U.S. 19 (1964). Also forbidden in Virginia were integration in public places, *Brown v. City of Richmond*, 204 Va. 471, 132 S.E. 2d 495 (1963), and interracial marriages, *Loving v. Virginia*, 388 U.S. 1 (1967).

Similarly, Brunswick County has a long history of discrimination against its black citizens. The Board of Supervisors opposed desegregation of the public schools and opposed busing to integrate the schools. In 1959, the Board of Supervisors passed a resolution opposing the hiring of white professors at St. Paul's College, a black college in the county. Also in 1959, the town of Lawrenceville transferred the public pool and recreational facilities to an all-white country club, the Elm Acres Club. That club remains all white to this day. Until 1969, the Board of Supervisors approved private tuition grants for

white parents to allow their children to attend private schools.

More recently, in 1982, a group of black citizens began a campaign to increase black voter registration. they petitioned the registrar of Brunswick County to increase the hours the office was open, to conduct satellite registration, and to appoint a greater number of black deputy registrars. The registrar resisted and eventually resigned rather than implement any changes in voter registration.

Brunswick County has one high school and one junior high school but has four elementary schools. Three of those elementary schools, Red Oak, Meherrin-Powellton, and Totaro are roughly 70% black and 28% white. The fourth school, Sturgeon, is approximately 98% black, with less than 10 white children out of a total of 240 children. In April, 1984, the principal of Sturgeon Elementary wrote the parents of white children scheduled to enter kindergarten at this school in the fall to encourage the parents to enroll their children in public school. The principal's letter promised that all white children would be taught in the same classroom and would have a white teacher. The School Board reprimanded the principal in private and instructed the superintendent of schools to place a letter expressing their disapproval in the principal's personnel folder.

However, the Brunswick County School Board continues to permit significant numbers of white children

who would otherwise attend Sturgeon Elementary to attend elementary schools in other districts. Presently, approximately 22 to 25 white students who live in the Sturgeon District attend public schools other than Sturgeon Elementary. Thus, more than two-thirds of the white children who live in Sturgeon and attend public elementary school attend school in another district.

Black citizens have also been seriously underrepresented on government boards and commissions in Brunswick County. The majority of election officials are white. Similarly, the school board, which is appointed by the electoral board, has three black and four white members, though the student population is overwhelmingly black. No blacks served on the school board before 1972, when, under pressure, the county created two at-large seats for black citizens. Only one black citizen, from Sturgeon, has been appointed to the school board to represent an individual election district.

The situation is the same with the other boards and commissions in the county. Though the population of Brunswick County is 57.4% black, not a single board or commission has a black majority. Defendant Daniel testified that in ten full years as a supervisor, he has appointed only two blacks to boards or commissions in the county. He appointed one to the Recreation Department and one to the Anti-Litter Campaign. Daniel represents a district that is 55% black. Similarly, defendant Taylor testified that he could not recall a single instance in his

ten years on the Board of Supervisors in which he appointed a black citizen to a board or commission. Taylor represents a district which is more than half black. Finally, defendant Peebles testified that since 1982 he has appointed only one black to a county board, the Anti-litter Committee. Peebles' district is almost 49% black. All of these men admitted that there are qualified blacks in their districts, yet none could find more than a token number of black citizens to serve on county boards.

Similarly, the Board has had two opportunities, in 1979 and 1982, to appoint a supervisor to complete an unexpired term. Each time, the Board of Supervisors chose Dale Baird over James Jones and defendant Taylor to represent district three. In 1982, the Board appointed defendant Peebles over Harold Maclin, who is black, to represent district five. Maclin had lost the election for the district five seat in 1979. Running as an incumbent, Peebles has won re-election in 1982, 1983 and 1987.

The underrepresentation of blacks extends to employment in county government. In 1988, Brunswick County had 47 full-time employees, 41 of whom were white. None of the black employees were employed in an administrative or professional position.

Instances of discrimination in Brunswick County have occurred in the private sector as well as the public sector. The Klu Klux Klan was very active in Brunswick County in the 1960's. Similarly, at the time the schools were integrated, there was great resistance within the

county, and an all-white school, Brunswick Academy was opened. The segregated movie theater closed rather than integrate. As recently as 1981, the Brunswick County Homemakers group disbanded rather than integrate as ordered by the Department of Agriculture.

Moreover, segregation is the norm in all aspects of Brunswick County life. Both plaintiffs' and defendants' witnesses testified that virtually all social clubs, political clubs, and churches were either all-white or all-black. Two of the three white supervisors, Daniel and Taylor, testified that they send their children to Brunswick Academy rather than the integrated public schools. The Democratic Party in Brunswick County is predominantly black while the republican Party is predominantly white. There is no evidence that any organization in Brunswick County is more than nominally integrated.

In addition to the effects of discrimination and segregation in Brunswick County, blacks suffer from lower educational, economic, and employment levels. According to the 1990 census, 14% more whites in Brunswick County are high school graduates and, on the average, whites had 2.5 years more schooling than blacks. The per capita income of blacks is less than half that of whites. Similarly, the average black family earns only about two-thirds what the average white family earns. Only 5.6% of whites live in houses without bathroom facilities, while 32.1% of blacks live in such conditions. The unemployment rate of blacks in Brunswick County is over three times that of

whites and during one year, 1979, over a third of the black population was unemployed.

III

In 1982, Congress substantially revised § 2 of the Voting Rights Act "to make clear that a violation could be proved by showing discriminatory effect alone and to establish as the relevant legal standard the 'results test.'" *Thornburg v. Gingles*, 478 U.S. 30, 35 (1986) (citations omitted). The amended statute reads as follows:

> (a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision is a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in section 1973b (f) (2) of this title, as provided in subsection (b) of this section.
>
> (b) A violation of subsection (a) of this section is established is, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) of this section in that its members have less opportunity than other members of the

> electorate to participate in the political process and to elect representatives of their choice. The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered: *Provided*, That nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.

42 U.S.C. § 1973 (emphasis in original).

The Senate report accompanying the 1982 amendments to the Act set forth seven typical factors which determined whether there had been a violation of §2. The factors are as follows:

> 1. The extent of any history of official discrimination in the State or political subdivision that touched the right of the members of the minority group to register, to vote, or otherwise to participate in the democratic process;
>
> 2. The extent to which voting in the elections of the State or political subdivision is racially polarized;
>
> 3. The extent to which the State or political subdivision has used unusually large election districts, majority vote requirements, anti-single shot provisions, or other voting practices or procedures that may enhance the opportunity for discrimination against the minority group;

> 4. If there is a candidate slating process, whether the members of the minority group have been denied access to that process;
>
> 5. The extent to which members of the minority group in the State or political subdivision bear the effects of discrimination in such areas as education, employment and health, which hinder their ability to participate effectively in the political process;
>
> 6. Whether political campaigns have been characterized by overt or subtle racial appeals;
>
> 7. The extent to which members of the minority group have been elected to public office in the jurisdiction.

S. Rep. No. 417, 97th Cong., 2d Sess. 27, 28-29 (footnotes omitted). These factors, however, are neither comprehensive or exclusive. *Gingles*, 478 U.S. at 46. Further, the Senate Report specifically states "that there is no requirement that any particular number of factors be proved, or that a majority of them point one way or the other." S. Rep. No. 417, 97th Cong., 2d Sess. at 29.

The Supreme Court comprehensively analyzed the requirements for a Voting Rights Act claim in *Gingles*. The Court held that "the essence of a § 2 claim is that a certain electoral law, practice, or structure, interacts with social and historical conditions to cause an inequality in the opportunities enjoyed by black and white voters to elect their preferred representatives." *Gingles*, 478 U.S.

at 47. The Court also identified three threshold requirements for the proof of a claim. First, the minority group must show that "it is sufficiently large and geographically compact to constitute a majority in a single-member district." *Id.* at 50. "Second, the minority group must be able to show that it is politically cohesive." *Id.* at 51. "Third, the minority must be able to demonstrate that the white majority votes sufficiently as a bloc to enable it . . . usually to defeat the minority's preferred candidate." *Id.*

Gingles dealt with a challenge to a system based on multi-member districts rather than the single-member district system in Brunswick County. The Court expressly stated that it had no occasion to decide whether the three threshold requirements applied to the type of claim brought here. *Id.* at 46 n. 12. However, since *Gingles*, the Fourth Circuit has cited the *Gingles* test as an essential element of a vote dilution claim. *McGhee v. Granville County*, 860 F. 2d 110, 117 (4th Cir. 1988); *Collins v. City of Norfolk*, 816 F.2d 932, 935 (4th Cir. 1987). The Court finds that the *Gingles* test is appropriate for use in the single district context in Brunswick County. Thus, the Court will apply the *Gingles* test as well as the appropriate Senate Report factors in analyzing whether, under the totality of the circumstances, a violation of the Voting Rights Act has occurred in Brunswick County.

First, the Court finds that the black population of Brunswick County is sufficiently large and geographically

compact to constitute an effective voting majority in three election districts. There are already four black majority districts, and there are three districts with a black majority of 55% or greater. Moreover, plaintiffs have submitted two plans providing for three districts with black majorities of approximately 65% or greater. Defendants dispute whether such super-majority districts are required by the Voting Rights Act. However, the compactness test is not concerned with whether black majority districts are required but only with whether the distribution of the minority group makes such districts feasible. Clearly, such districts are feasible, and so the compactness test is satisfied.

The second and third *Gingles* requirements as well as one of the Senate Report factors focus on the existence of racial bloc voting or racially polarized voting. By examining racial bloc voting, the Court can ascertain whether the minority group is politically cohesive and whether white bloc voting is significant enough to usually defeat the minority's preferred candidate. *Gingles*, 478 U.S. at 56. The standard for the existence of racially polarized voting "looks only to the difference between how majority and minority votes were cast; it does not ask why those votes were cast the way they were." *Collins*, 816 F.2d at 935.

To demonstrate racial bloc voting, plaintiffs' expert, Dr. Allan J. Lichtman, reviewed the voting returns in every Brunswick County election since 1971 in which

a black candidate ran against a white candidate. For each countywide race, Dr. Lichtman graphed the percentage of votes received by the black candidate in each precinct against the percentage of blacks in the population of each precinct. In virtually every election, the graphs showed that the black candidate received an extremely low percentage of the votes in white majority precincts. Conversely, the black candidate received an extremely high percentage of the votes in black majority precincts.

Dr. Lichtman also compared the votes received by the black candidate in each precinct in each election with the votes received by the black candidate in the same precinct in other elections. Dr. Lichtman found a very high pattern of correlation between elections. In other words, different black candidates in different elections received substantially the same amount of the votes in each precinct. Dr. Lichtman testified that the level of correlation was "very unusual" and in some cases "astoundingly high." Based on the graphic representation and the correlation analysis alone, Dr. Lichtman testified that there was a "crystal clear" pattern of racially polarized elections in Brunswick County extending over 17 years.

Dr. Lichtman also presented an ecological regression analysis of the voting in Brunswick County to estimate the percentage of blacks and whites who are voting for the black and white candidate in a particular election. On average, Dr. Lichtman found that 98% of the white voters voted for a white candidate while only

2% of the white voters voted for a black candidate in any particular election. On the other hand, roughly 83% of the black voters voted for a black candidate while 17% of the black voters voted for a white candidate. Thus, while black voters supported the black candidate in landslide levels, they did not support black candidates to a degree which could overcome the monolithic white vote for the white candidate combined with the black vote for the white candidate.

Only one election did not follow the pattern of racial bloc voting. That election was the United States Senate election of 1988. In that campaign, the white candidate, Chuck Robb, received extensive support from both white and black voters. On the other hand, the black candidate, Maurice Dawkins, received very low black support. While Dawkins did not receive a majority of white support, Dr. Lichtman's analysis found that he did receive 24% of the white vote, vastly more than any other black candidate in any other election. In fact, the ecological regression analysis found that this campaign was free of racial polarization; black and white voters supported each candidate to the same degree.

Dr. Lichtman also estimated the minimum black population necessary for a black candidate to be successful in an election district in Brunswick County. Dr. Lichtman found that a black candidate needed to run in a district that was at least 65% black in order to overcome the high degree of racial bloc voting among whites, the lower

percentage of voting age population among blacks, and the higher turnout by white voters. For example, in a hypothetical district with a black population of 65%, Dr. Lichtman estimated that blacks would make up only 62% of the voting age population. Because of lower turnout, Dr. Lichtman estimated that blacks would constitute only about 52.8% of the actual voters in such a district. Assuming that a high percentage (96%) of black voters would support the black candidate, Dr. Lichtman estimated that the black candidate would receive 50.7% of the vote.

Dr. Lichtman's estimates are borne out by the actual voting returns in Brunswick County. Black candidates in Board elections have received a majority of the overall vote only in districts that have a black population of 65% or more. In the other districts, where blacks constitute up to 55% of the population, black candidates have received no more than 35% of the vote.

Defendants' expert, Dr. Noel Dunivant, testified that Dr. Lichtman's analysis was inherently unreliable and subject to great margins of error. As a result, Dr. Dunivant testified, the Court cannot accept Dr. Lichtman's conclusions. Specifically, Dr. Dunivant testified that Dr. Lichtman's analysis violated the test of constant proportions because the proportion of the black voting age population voting for the black candidate did not remain consistent from precinct to precinct. Second, Dr. Dunivant testified that the analysis violated the test of

negative proportions because estimations of the white vote for the black candidate frequently went below zero. Finally, Dr. Dunivant testified that the analysis had margins of error which were unacceptably high.

However, in rebuttal testimony, Dr. Lichtman addressed each one of Dr. Dunivant's criticisms. He testified that the proportions in his analysis were sufficiently constant to meet the requirements or reliable regression analysis. As to the negative proportions, Dr. Lichtman testified that he used the same methodology which the Supreme Court implicitly accepted in *Gingles*. *See Gingles*, 478 U.S. at 50-52. In addition, Dr. Lichtman testified that his adjustment of the equation to bound it at 0 and 100 is supported in the literature and has been verified in homogenous precinct analysis by both Dr. Grofman, the expert in *Gingles*, and himself. The occurrence of negative proportions merely indicates that the regression equation is very steeply sloped. Rather then being an unreliable measure of racial bloc voting, such a slope indicates an extreme case of racial polarization.

Finally, as to the margins of error, Dr. Lichtman testified that the methodology used was identical to that used in *Gingles*. Further, the margins of error were not great enough to call into question his conclusions about racially polarized voting. The pattern of racially polarized voting which appears throughout the elections in

Brunswick County demonstrates that the estimations are generally correct regardless of the margin of error.

The Court is persuaded by the testimony of Dr, Lichtman. The ecological regression analysis employed by Dr. Lichtman was the same as used in *Gingles* and has been cited with approval by other federal courts. *See Carrollton Branch, NAACP, v. Stallings*, 829 F.2d 1547, 1558 (11th Cir. 1987). Dr. Lichtman adequately refuted each of Dr. Dunivant's criticisms and demonstrated that the analysis he use was reasonable and accurate. Moreover, Dr. Dunivant's analysis does not refute the first part of Dr. Lichtman's testimony. That testimony established beyond doubt that the percentage of the vote received by a black candidate is strongly related to the black population of a particular precinct. Accordingly, the Court accepts Dr. Lichtman's conclusions that voting in Brunswick County is racially polarized, that the black population of Brunswick County is politically cohesive, and that monolithic white bloc voting is significant enough to usually defeat the minority's preferred candidate.

The other applicable Senate Factors also support a finding that the current election districts violate the Voting Rights Act. Official discrimination directly affecting the right to register and vote occurred as recently as 1982, when the registrar of the county refused to make the registration system fully available to black citizens. Similarly, discrimination in the appointment of boards and commissions in Brunswick County has directly impinged

on the ability of the black population to participate effectively in the political process. The black population of Brunswick County also bears the lingering effects of discrimination in such areas as education, employment, housing, and earning power. The Court finds that these conditions hinder the ability of blacks to participate fully in the political process in Brunswick County.

Accordingly, the Court finds that under the totality of the circumstances, the current system for election to the Board of Supervisors has interacted with past and present official discrimination and social conditions to deprive the black population of Brunswick County of an equal opportunity to participate in the political system and to elect representatives of their choice. *See McGhee*, 860 F.2d at 117. The Court also finds that to eradicate the inequality, the districting system in Brunswick county must be restructured to contain three districts with black population of 65% or greater.

The Court emphasizes that its ruling is not based in any degree on the right of members of a minority to be elected in numbers equal to their proportion in the population. Defendants argue vehemently that the only possible basis for the relief plaintiffs seek is a right to proportional representation and that § 2 of the Voting Rights Act expressly rejects the existence of such a right. On the contrary, the Court has expressly found the existence of racially polarized voting in Brunswick County, a high degree of monolithic voting by the white

population, ongoing official discrimination in Brunswick County which directly affects the right to vote and the ability to participate in the political process, and severe lingering effects of discrimination in the areas of education, employment, and health which hinder the minority's ability to effectively participate in the political process. A right to proportional representation has not entered into the Court's reasoning at any point.

Defendants place a great deal of emphasis on the success of black candidates in district two and district four and the representation of blacks on most county boards and commissions. However, the ability to elect one or two representatives or the success in having some members of the minority appointed to boards and commissions does not necessarily defeat a voting rights action. *Collins, et al., v. City of Norfolk, et al.*, No. 88-3950, slip op. at 17 (4th Cir. Aug. 18, 1989). Defendants essentially argue that some minority electoral success precludes the possibility of a Voting Rights Act violation. That analysis "simply places a stamp of approval on token representation." *Id.* at 18. Accordingly, the Court rejects defendants' argument that the only basis for relief in this case is the existence of a right to proportional representation.

Once a violation of § 2 is established, the Court should "exercise its traditional equitable powers to fashion the relief so that it completely remedies the prior dilution of minority voting strength and fully provides equal

opportunity for minority citizens to participate and to elect candidates of their choice." S. Rep. No. 417, 97th Cong., 2d Sess. at 31. In reviewing the plans submitted by plaintiffs, the Court finds that plaintiffs' "Voting Plan A" best remedies the vote dilution which has occurred in this case.

Accordingly, the Court will order defendants to immediately restructure the election districts in Brunswick County to comply with plaintiffs' "Voting Plan A." This plan shall be used for candidates seeking to qualify for the 1991 election to the Board of Supervisors and shall be used for that election. If the 1990 census impacts upon this plan and necessitates redistricting, the district lines shall be adjusted to the minimum extent necessary and in accordance with this Memorandum Opinion. Any such revisions shall be subject to Court supervision.

An appropriate Order shall issue.

/s/ James R. Spencer
United States District Judge

Date: 31 August, 1989